4-6-2012

State v. Keithly Appellant's Brief Dckt. 39033

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Appellant-Cross Respondent, v. DONALD MICHAEL KEITHLY, Defendant-Respondent-Cross Appellant.	)))))))))	NO. 39033-2011 (39034-2011/39035-2011/39036-2011)

BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District, in and for Valley County

Honorable Michael R. McLaughlin, District Judge

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Nature of the Case

This is an appeal of the District Court's rulings on usurpation actions brought against individual board members of the Southern Valley County Recreational District.

Procedural History

The Valley County Prosecutor in the name of the State filed Complaints for usurpation of office, and declaratory and injunctive relief, eventually against four individual directors, while the respective individuals were all still in office. A Motion for Temporary Restraining Order and Notice of Hearing was filed on April 18 2011 setting the matter for hearing on April 28 2011 At that hearing the District Court declined to grant the restraining order involving specifically Ms Davis the Court finding that there was not a showing of irreparable harm or injury and that counsel for the Defendants would not be disqualified The Defendants filed a Motion for Summary Judgment on April 26 2011 The State on March 31 2011 filed a Memorandum in Support of their Motion for Summary Judgment Following the issuance of the District Court's ruling in favor of the individual Defendants, but finding that the State had an obligation to bring the actions and attorney fees were not awarded to the Defendants. The State appealed and the Defendants cross-appealed on the issue of attorney fees.

Statement of Facts

The Southern Valley County Recreational District ("SVCRD") is a recreation district formed pursuant to the process set forth in Idaho Code § 31-4304 and is located wholly within Valley County, Idaho. In 2002, the SVCRD published specific Notice of Election Filing Deadline for the subdistrict (3) position held by the Defendant Yvette Davis. For the subdistrict (3) term beginning in January 2003, the Defendant was deemed elected pursuant to operation of law provided by Idaho Code § 31-4306(2) as notice of the election had been properly published and she was the only qualified candidate to file for the position.

In 2006, however, no Notice of Election Filing Deadline was published as required. Affidavit of Lorena Behnke in Support of Joint Motion to Dismiss, ln. 1, π. 7, p. 3. ("Behnke Affidavit").The Defendant did not timely file a declaration for candidacy and no election was held for the office of director, subdistrict (3). *See, Id.*, Exhibit A. The SVCRD did not meet the alternative election requirements for the Defendant Yvette Davis to hold the position, but yet she remained in office. The SVCRD noticed a replacement election, however, the noticed replacement election was not for the position as a director, rather the public notice stated the position for the office of president of the SRVCD, a position that only the sitting directors, rather than the electorate of the District, are allowed to cast votes for. I.C. § 31-4309.[1] The notice of cancellation of election for the office again stated it was for the president position. Exhibit A, p.3, *Id.* Regardless of the office title, there is no express statutory cure for missing an election as contended by SVCRD Election Official, Lorena Behnke, in her affidavit. *Id.*, at π 7, p.3. The Defense has cited no legal authority for this proposition. There is no record of the SVCRD seeking judicial relief through a Declaratory Judgment for the missed elections in 2004 or 2010. There is no record of the SVCRD exercising the statutory cure to fill the vacancy for an expired term, which is the appointment of a replacement by the Governor. I.C. § 59-912. Defendant acquired her position on the SVCRD Board through appointment by the Governor and it is the specific relief the Plaintiff sought in this case. The SVCRD Election Official, Lorena Behnke, nevertheless asserts, that the SVCRD efforts properly cured the missed elections despite that Ms. Davis provided notice that she was running for the office of President, and not for the Board Member representative for subdistrict (3). *Id.* π 7, pp. 3 & 4.

No Notice of Election Filing Deadline was filed for election to the subdistrict (3) board position for the statutory scheduled November, 2010 election. *See Id.*, π 8, p.4; and April 1, 2011 Affidavit of

1. 31-4309. OFFICERS OF BOARD. The officers of the board shall consist of a president, a vice president, a secretary and a treasurer. The president and vice president shall be elected by the board and each shall be a director. The secretary and treasurer shall be appointed by the board and may be a director or any other person. The offices of secretary and treasurer may be filled by the same person. All officers shall serve at the pleasure of the board. Each officer shall take, subscribe and file with the secretary an oath of office before assuming any duties. The board shall fix a compensation, if any, to be paid to each officer which compensation shall be paid out of the funds of the district.

Matthew C. Williams, Exhibit B, π 3, p.2, of the January 5, 2011 letter from Stephanie Bonney. The SVCRD attributes the missed 2006 election and resulting confusion (apparent conflict between the fixed election dates and fixed terms of office as provided by statute and self-help "cure") as the reason for also missing the 2010 election. *Id.*

After patrons of the SVCRD submitted a petition on October 26, 2010[2] asking the SVCRD Board to investigate the lack of elections, the Board refused and referred the inquiry to the Idaho Secretary of State who's office referred the petitioners to the Valley County Prosecuting Attorney ("VCPA") to investigate pursuant to the public office usurpation statute, I.C. § 6-602. April 1, 2011 Affidavit of Matthew C. Williams, π 2, p. 1 and Exhibit A, p. 1[3]. Mr. Williams concluded that pursuant to I.C. § 6-602 and the referral from the Office of the Secretary of State, that his office was required to investigate the issue. *Id.* His letter dated November 5, 2010 requested a meeting with the SVCRD Board to address the issues and reach an expedient cure. *Id.* Instead, the SVCRD Board, as reflected in the absence of entry of any such decision being motioned or made on the public record for any of the November, 2011; December, 2011; January, 2012; and February, 2012, SVCRD Board Members made a secret decision to not meet with the VCPA, but to pursue alternative measures in coordination and cooperation with the Idaho Secretary of State and the Idaho Attorney General's Office contrary to open meeting law requirements. *See*, Behnke Affidavit, π. 8, p. 4 and I.C. § 67-2340[4]. Even a cursory review of the SVCRD Board minutes for the referenced November 18, 2010 meeting make it clear there is no record of any discussion, motion, vote, outcome of vote or public decision with regard to scheduling a replacement election, declaring the subdistrict (3) position vacant as of January 1; deciding not to meet with Mr. Williams but to act in "coordination and cooperation with the Idaho Attorney General's Office

2 Behnke asserts at π 8, p. 4 of her affidavit that this event occurred on September 14, 2010, the date of the SVCRD budget hearing and well before the October 7, 2010 deadline for write-in candidates.

3 Photocopies of at least 5 of the petitions are set forth in the April 20, 2011 Arment Affidavit, Exhibit 4,

4 67-2340.FORMATION OF PUBLIC POLICY AT OPEN MEETINGS. The people of the state of Idaho in creating the instruments of government that serve them, do not yield their sovereignty to the agencies so created. Therefore, the legislature finds and declares that it is the policy of this state that the formation of public policy is public business and shall not be conducted in secret.

(Brian Kane, Assistant Chief Deputy) and the Idaho Secretary of State's [O]ffice (Tim Hurst, Chief Deputy); appoint a replacement due to the expired term (in contravention of I.C. § 31-4305). Similarly, there are no records of any discussions, motions, votes or decisions on these subjects in any of the Board minutes from September, 2010 through (except a motion and second at the January 11, 2011 meeting to reappoint Davis to the vacancy pending the May, 2011 election which the minutes fail to record a vote being taken and the outcome of the same. See, April 20, 2011 Arment Affidavit, π 4, p.2; and Exhibit 3, pp.1 – 36.

Despite SVCRD legal counsel acknowledging that there were missed elections and procedural and substantive[5] election notice errors, Stephanie Bonney and the SVCRD Board Members refused to meet with Mr. Williams and instead her firm attempted to cajole desired written positions from Hurst and Kane. *See*. April 20, 2011 Arment Affidavit, Exhibit 1, pp. 4-8, February, 2010 Email exchanges between Stephanie Bonney and Tim Hurst; and *Id.*, Exhibit 2, page 2, April 1, 2011 Email from Paul J. Fitzer to Brian Kane, Deputy Attorney General. The SVCRD and their counsel for some reason are still waiting for those written opinions.

In fact, the public records available of all three agencies: the SVCRD, the Secretary of State, and the Attorney General's Office, do not reflect any public meetings, workshops, or any forum where the issue was jointly (or even individually) addressed and decided upon as asserted by the SVCRD. *See*, April 20, 2011, Arment Affidavit, Exhibits 1-3. The SVCRD still has no record of compliance with law and that valid public decisions were made to declare the Davis board member position vacant and call for the May 17, 2011 replacement election for the subdistrict (3) board position as a cure for missing the election. *See Id.*, Exhibit 3.

5. With regard to the notice of filing deadline in the 2008 election for subdistrict positions (1) and (2), states: I agree with him (Matt Williams, Prosecuting Attorney) that the notice was published a couple of days early and should have referenced the specific subdistricts ..." The notice also neglected to advise how many positions were open for election.

Despite the summary decision of the SVCRD Board at the October 26, 2010 meeting not to investigate the complaints, the SVCRD made another secret decision to backtrack, pull a 180 degree reversal and did so without making that public policy decision on the record, following receipt of the VCPA's November 5, 2011 letter. Stephanie Bonney, legal counsel for the SVCRD supposedly since on or about April 2010,[6] appeared at the November 18, 2010 SVCRD Board meeting, made a presentation and was questioned about who she represented: "All of us, or the Board?" Bonney first stated that she represented the directors as opposed to the SVCRD and its patrons and later reversed her position, saying she represented the SVCRD and the board members as decision makers for the SVCRD, or words to that effect. April 13, 2011 Affidavit of Dennis Marguet, π 4, pp.2 & 3. .Ms. Bonney subsequently caused a featured "Guest" letter to be published in the January 19, 2011 issue of the *Long Valley Advocate*, the official newspaper for the SVCRD, asserting to the public that she had "independently" investigated the issues and basically decided that the SVCRD had cured all the problems and would hold a replacement election for the missed November 2010 election at the next election, May 17, 2011. April 20, 2011 Arment Affidavit, Exhibit 5, pp. 1 & 2.

At the SVCRD November 18, December 14, and December 28, 2010 Meetings, Yvette Davis participated as an active officer and board member and there was no declaration or decision that her board position would be vacant January 1, 2011. April 20, 2011 Arment Affidavit, Exhibit 3, pp. 19-21. At the January 11, 2011 meeting a letter from Yvette Davis was read expressing interest in "being appointed to the Board seat that that was vacated January 1, 2011" (in advance of Ms. Bonney's January 19, 2011 opinion letter in the *Long Valley Advocate*) *Id.*, at Exhibit 3 p. 22; and Exhibit 5, pp. 1 & 2 The minutes of the meeting were later attempted to be amended February 21, 2011 (after the VCPA made written complaint regarding open meeting violations) to disclose that there was no discussion and

6. According to SVCRD Agenda for a special meeting and executive session at SVCRD Counsel's offices February 17, 2011first voiding then ratifying retention of Davis, as there were no prior public records of the decision to hire counsel by the SVCRD, but unfortunately, there are no board minutes for a February 17, 2011 special meeting. April 20, 2011 Arment Affidavit, Exhibit 3, pp. 32 & 33.

that Yvette Davis was appointed to fill the position vacated for expiration of term until the May election, but there was no call or vote recorded for said February 21, 2011 amendment. *Id.*, at Exhibit 3, p. 34. Ms. Davis and her legal counsel, who have multiple individual representations with other Board members, and the SVCRD, assert before this Court, that such appointment back of Ms. Davis on the vacancy they declared was required by I.C. § 31-4305.[7] The specific provision on such appointments, however, reads: "Any vacancy occurring in the office of director, ***other than by expiration of the term of office***, shall be filled by appointment by the board for the unexpired term." (Emphasis added). The term had expired. Ms. Davis had already vacated the office, she was not a holdover as a matter of record, even according to Paul Fitzer: "We declared the chair vacant on Jan 1 and the Board appointed an interim replacement until the May election. You have any additional thoughts on that?" Id., Exhibit 2, π 2, p.2. April 1, 2011 email to Brain Kane.

In the first part of February, 2011 the VCPA sent the SVCRD a complaint about Open Meeting Violations[8] involving the failure to record disposition of motions, matters decided which were not recorded in the agency minutes and lack of notice and procedure,[9] including hiring of counsel; the

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7 31-4305. DIRECTORS -- QUALIFICATIONS -- VACANCY -- COMPENSATION -- TERM. Each district shall be governed by a board of three (3) directors who shall manage and conduct the business and affairs of such district and all powers granted to such district by this chapter shall be exercised by such board or its duly authorized officers and agents.

At any time after the creation of the district, the board of directors may, by resolution duly adopted, increase the size of the board from three (3) members to five (5) members. The resolution shall provide for the designation of five (5) director's subdistricts. A qualified elector shall be appointed by the board to each of the newly created director's positions, one (1) of whom shall serve until the first district election thereafter held, and one (1) of whom shall serve until the second district election thereafter held.

Every director appointed or elected shall be a qualified elector and a resident of such district. Not more than one (1) director shall reside in the same director's subdistrict. Each director shall take and subscribe an oath of office before assuming any duties which oath shall be filed in the records of the board. Any vacancy occurring in the office of director, other than by expiration of the term of office, shall be filled by appointment by the board for the unexpired term. The directors shall receive no compensation for their services as a director but shall be entitled to reimbursement for the amount of their actual and necessary expenses incurred in the performance of their official duties. Following the term of the initial appointment, a director shall be elected for a term of four (4) years which shall begin on the first day of January of the year following such election and shall continue until a successor is elected and has qualified.

8. 67-2342.GOVERNING BODIES -- REQUIREMENT FOR OPEN PUBLIC MEETINGS. (1) Except as provided below, all meetings of a governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting except as otherwise provided by this act. No decision at a meeting of a governing body of a public agency shall be made by secret ballot. ...

9. 67-2344.WRITTEN MINUTES OF MEETINGS. (1) The governing body of a public agency shall provide for the taking of written minutes of all its meetings. Neither a full transcript nor a recording of the meeting is required, except as otherwise provided by law. All minutes shall be available to the public within a reasonable time after the meeting, and shall include at least the following information:

(a) All members of the governing body present;

(b) All motions, resolutions, orders, or ordinances proposed and their disposition;

(c) The results of all votes, and upon the request of a member, the vote of each member, by name.

(2) Minutes pertaining to executive sessions. Minutes pertaining to an executive session shall include a reference to the specific statutory subsection authorizing the executive session and shall also provide sufficient detail to identify the purpose and topic of the executive session but shall not contain information sufficient to compromise the purpose of going into executive session.

Board vacancy; and executive session requirements. With the limited exception of incomplete amendments, the general response from the SVCRD before the May election defeat and successful recall elections of Keithly and Cowles, there had been an apparent decision to summarily and immediately ratify actions after previously declaring the same void. The SVCRD listed two meetings on its web site to be held on February 17, 2011 in Boise, Idaho, however, there are only minutes of a work session. Notice of an Amended Special Meeting Notice and Executive Session for meetings in Boise at SVCRD counsel's office, however, contains an agenda stating that the SVCRD "shall cure purported open meeting act violations... by declaring said actions void and thereafter the Board shall ratify said activity and/or decisions rendered." *Id.*, at Exhibit 3, pp 32 & 33.

In yet another example of secret decision making, the newspapers reported the $7,000 purchase of used gym equipment by the SVCRD from Shore Lodge on or about mid-November, 2010. *Id.*, Exhibit 6, p. 5. The SVCRD public records are devoid of any mention of this purchase opportunity and execution.

At some time, the Board apparently secretly decided to provide and pay for the individual attorney representation of Board Members who had usurpation actions instituted against them by the VCPA. A hint to this effect was revealed in the February 16, 2011 edition of the *Long Valley Advocate* which reported the following events:

> The board was also brought to task by Dennis Marguet, another citizen in attendance, who said he thought it was a mistake by the board to not solicit names from members of the district who might be interested in filling Davis' seat. He said he was sure that both Cowles and Smith would have voted to appoint Davis back to the seat she's held since the recreation district was formed, but he said not to publicize the opening and solicit letters of interest from others only "threw fuel on the fire" and reinforced a belief that the recreation district board is a "secret organization".
>
> "You make a good point Cowles said."

> Marguet also said his understanding was that if Williams followed through on his threat to sue the board members individually that recreation district funds could not be used to defend board members.
>
> "That's wrong," Davis said before board members again said they couldn't discuss what was at that time only a threat of suits upon the advice of their Boise attorney Stephanie Bonney.

April 20, 2011, Arment Affidavit, Exhibit 2, pp. 7 & 8, photocopy of February 16, 2011 article in the *Long Valley Advocate*.

Dennis Marguet also attended the SVCRD Board Meeting which occurred on or about March 21, 2011 (minutes not posted by the SVCRD) where he reports that the Board originally intended to approve in "whisper," payment of the sum of approximately $9,700 from SVCRD funds for the private representation of individual Board members sued for Usurpation by the VCPA. April 13, 2010 Marguet Affidavit, π 7, p. 4; and *see*, April 20, 2011 Arment Affidavit, Exhibit 6, p. 15, Guest Opinion of Olin Balch, "Burning money at SVCRD", April 13, 2011 *Long Valley Advocate*. The Board had advised that the bill for fees in the amount of approximately $9,700 from Moore Smith Buxton & Turcke, Chartered, was for payment for legal defenses of Board Members in the usurpation suits. Nowhere in the VCRD Board Minutes available to the VCPA and the public, is there any item for business on the hiring of the Moore Smith Buxton & Turcke, Chartered at SVCRD public expense for the private or "tort claim" legal representation of Board Members for usurpation. Similarly, there is no item or discussion of waiver of any conflicts including dual and multiple representation and payment from SVCRD public funds to defend individual board members for private usurpation actions at the expense of the SVCRD and its patrons who they owe fiduciary duties by law. The clear language of I.C. § 31-1541 prohibits recreational boards from appointing board members to positions with expired terms as is the admitted case with the Defendant Yvette Davis.

Davis, her fellow Board Members, and their counsel have asserted that the usurpation actions are the result of improper personal motives and collusion for personal financial gain related to a 501(c)(3) nonprofit organization which operates a remarkable and outstanding park resource on the

Payette River in Cascade, Idaho, open and free to the public, known as Kelly's Whitewater Park. The philanthropist who has dedicated tremendous personal assets, time and effort for the benefit of the public and Dick Carter, the Mayor of the City of Cascade responded with strong and logical denials to these accusations in the April 13, 2011 edition of the *Long Valley Advocate*. April 20, 2011 Arment Affidavit, Exhibit 7, (two separate letters to the Editor).

Despite these developments, and the clear and documented usurpation Davis, Cowles, Smith and Keithly during the pendency of their suits, they accelerated the unlawful actions of the SVCRD after the disclosures of the improprieties and refusal to meet were revealed and suit was filed. *See*, April 13, 2011 Marguet Affidavit;. and April 20, 2011Arment Affidavit, Exhibit 3, pp. 1-36 documenting by volume the dramatically increased SVCRD meetings before the trial court's decision. On or about February 25, 2011, Defendant Michael Smith announced his resignation as a board member. April 20, 2011Arment Affidavit, Exhibit 3, p. 35. The SVCRD decided to provide public notice of the opening but did not wait and for the notice to be published before making the subsequent appointment of Mike Keithly to fill the new vacancy by vote of the two remaining directors, one of which was the usurper Yvette Davis appointed contrary to I.C. § 31-4350. See, April 20, 2011 Arment Affidavit, Exhibit 6, p. 13, Defendant Mike Keithly's Letter to the Editor as published in the *Long Valley Advocate*. Without the usurper Davis' improper vote as a board member, Keithly could not have been appointed by the SVCRD Board due to a lack of quorum requirements publically recognized by at least one SVCRD patron. *Id.*, Exhibit 6, p. 15, Guest Opinion of Olin Balch, "Burning money at SVCRD", April 13, 2011 *Long Valley Advocate.* That did not stop the Defendants however.

With regard to Michael Smith, it is undisputed that the notice for the board position he took in 2008 failed to identify what subdistrict board positions were up for election, how many board members were up for election (from the notice there appeared to be one). The specific subdistrict position is

required in the notice pursuant to I.C. § 31-4306(1), which sets forth in part: "Each nominating petition shall state the subdistrict for which the nominee is nominated."

ISSUES PRESENTED ON APPEAL

A. Whether the District Court erred by declaring the usurpation action against Yvette Davis' as moot.

B. Whether the District Court erred in applying the de facto officer doctrine in usurpation actions.

C. Whether the District Court erred in applying election contest requirements to usurpation actions.

STANDARD OF REVIEW

The standard of review on appeal from an order granting summary judgment is the same standard as that used by the district court in ruling on the motion for summary judgment. *Tolley v. THI Co.*, 140 Idaho 253, 259, 92 P.3d 503, 509 (2004). Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.;* I.R.C.P. 56(c). The facts will be liberally construed and all inferences will be drawn in favor of the non-moving party. *Id.* The fact that parties have filed cross-motions for summary judgment does not change the standard employed by the court in reviewing whether or not issues of material fact exist. *Intermountain Forest Management, Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). Each party's motion must be evaluated on its own merits. *Id.*

ARGUMENT

A. The District Court erred declaring the action against Yvette Davis moot because Davis was no longer holding of office at the time the District Court heard the motion for summary judgment.

The District Court essentially punted on the issue of whether Yvette Davis had been holding office illegally from 2007 through May of 2011 when she lost the contested special election in May 2011 by ruling the election made any issue of usurpation of office moot. The District Court declined to consider the merits of the claim even though there were substantial procedural defects in canceling the 2007 election, as well as, contrary to Idaho law, the outright illegal appointment of Yvette Davis to fill the new term beginning in January 2011.

1. Yvette Davis unlawfully held office from 2007 through January 2011.

Though Yvette Davis held office on the SVCRD Board from 1998 through May 2011, Ms. Davis never won or even faced an election. Of the elections Ms. Davis should have had to face, only the 2002 cancelled election was properly noticed, published, and then cancelled according to the provisions of Idaho law. Unfortunately, the election practices and procedure standards all ran downhill under the watch of Yvette Davis. Ms. Davis should have had to face an election in November 2006, however the SVCRD Board failed to comply with the requirements of Idaho law and no election in November 2006 was held to fill the new term of the position held by Mrs. Davis. Behnke Affidavit, π 7, p.3. Ms. Davis was appointed to the new term pending a special election. Though the records are suspect about Mrs. Davis's appointment, she continued to function as a member of the SVCRD Board. She was her own watch guard along with her fellow Board Members.

When the SVCRD published notice of the replacement election, the publication was for the office of President. *Id.*, Exhibit A, p. 2. No such office exists for purpose of election by the electorate, as the Board consists of three director positions and the President is elected by exclusive vote of the Board Members. These positions are distributed much like the elected positions of a Board of County Commissioners. Though the registered voters of the entire county may cast a vote for a commissioner,

the commissioner must live within the specified district to be eligible to hold office. The same is true with a director on the SVCRD. Though all the registered voters living within the SVCRD boundaries may vote, only qualified individuals living within the specific director's district seat that is up for election may hold the office. Thus, specific notice of the specific director seat is needed to properly identify which seat is up for election. The SVCRD failed to notify the public which director position was open. It is important to remember this was a special election to try and cure the fact SVCRD missed the election for the seat months earlier. Mrs. Davis was functioning as the president of the SVCRD at the time. Though the publication was in error, Mrs. Davis filed the correct declaration of candidacy. *Id.*, Exhibit A, p.1. This error is compounded by the fact the SVCRD Board had already missed all the deadlines for the November 2006 election. Further, Mrs. Davis declared candidacy for an entirely different position than the SVCRD Board published. The SVCRD Board then published the cancellation of the election for the office of President due to only one candidate declaring for the position. *Id.*, Exhibit A, p.3. No candidate declared for the position of president. These practi es failed to provide meaningful and statutory notice as required by I.C. § 31-1405, meaningful notice in accordance with Mullane v. Central Hanover Bk & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); and the voter's rights to suffrage. Idaho Constitution Article VI §§ 1; 2; & 4.

2. Yvette Davis was appointed to continue as an SVCRD Board Director in January 2011 in direct contravention of Idaho law and it was a usurpation of office.

As bad as the errors were in the 2006/2007 election of the Director position held by Yvette Davis, the errors in 2010 were even worse. The SVCRD missed all of the election deadlines for November 2010 for the subdistrict 3 Director position. Further, the District refused to acknowledge the complaints of the SVCRD patrons regarding the missing of the election until well after being brought up by members of the public in open meetings. April 20, 2011 Arment Affidavit Exhibit 4, pp. 1-5. The minutes are silent as to any decision by the SVCRD Board to hold a special election, yet it was announced that a special election would be held. *See, Id.*, Exhibit 3, pp. 1-36. Though there was no

vote declaring the seat vacant, yet the SVCRD Board appointed Yvette Davis to vacant position of subdistrict 3 that was vacant due to the expiration of the term. *Id.*, Exhibits 3 at p. 22, and 2,at page 2. (April 1, 2011Email from Paul Fitzer to Brian Kane).

The fact that Yvette Davis's term had expired and that she was nominally[10] appointed to fill the expired term are not disputed facts. R., p. 52. Defendant Yvette Davis admits no election was held in November 2010. *Id.*. The Defendant relies on Idaho Code §31-4305 as her support for her appointment to the current term of office as Director for District 3. Defendant's Memorandum in Support of Motion to Dismiss or in the Alternative Summary Judgment, p. 4.

The Defendant's reliance on I.C. §31-4305 as justification for curing any usurpation is misplaced. The third paragraph of I.C. §31-4305, authorizes the appointment to fill office vacancies as follows:

> Every director appointed or elected shall be a qualified elector and a resident of such district. Not more than one (1) director shall reside in the same director's subdistrict. Each director shall take and subscribe an oath of office before assuming any duties which oath shall be filed in the records of the board. ***Any vacancy occurring in the office of director, other than by expiration of the term of office, shall be filled by appointment by the board for the unexpired term.*** The directors shall receive no compensation for their services as a director but shall be entitled to reimbursement for the amount of their actual and necessary expenses incurred in the performance of their official duties. Following the term of the initial appointment, a director shall be elected for a term of four (4) years which shall begin on the first day of January of the year following such election and shall continue until a successor is elected and has qualified. (emphasis added)

The black letter law of I.C. §31-4305 clearly empowers a recreation board to appoint persons to fill vacancies with the specific exception of a vacancy caused by the expiration of the term of office. Defendant Yvette Davis not only admits her term was expired but also admits she was appointed to fill the vacancy of the new term. She then claims her new appointment cures her usurpation. The Defendant's unreasonable reliance on this statute for her claim of defense is essentially asking this Court to disregard the plain language and ignore a portion of the very statute she claims justifies her remaining in office.

10 Idaho Code § 67-2347 Violations, (1) actions at meetings failing to comply with the Open Meeting Law "shall be null and void", See, City of McCall v. Buxton, 146 Idaho 656 (2009).

3. Usurpation of office claim was not rendered moot by Yvette Davis's loss in a contested election.

The usurpation action brought by the Valley County Prosecuting Attorney's Office (hereafter VCPA) against Yvette Davis is a unique and seldom seen action. "I.C. § 6-602 [1] is a quo warranto proceeding whereby the State, suing on behalf of the people, challenges the authority of an official to hold office." People of the State of Idaho v. Wilkins, 101 Idaho 394 (1980), at 396, See also Tiegs v. Patterson, 79 Idaho 365, 318 P.2d 588 (1957); *Toncray v. Budge*, 14 Idaho 621, 95 P. 26 (1908). "It has long been established that quo warranto proceedings refer to the 'conditions that exist at the time the action is brought. *See, Wilkins* at 396 quoting *Toncray v. Budge*, 14 Idaho at 639, 95 P. at 31.

In this case, the VCPA brought the case after Yvette Davis was appointed to fill the position after the term had expired in an unlawful manner. The *Wilkins* court upheld previous decisions by this Court requiring the claim must be actionable at the time it was brought. There is no authority on which the District Court relied to determine the claim becomes moot once the person relinquishes office.

In fact, a determination that a claim is moot when the person leaves office essentially validates the actions taken by the usurping officer while unlawfully holding office under the color of law. Here, the usurping officer Yvette Davis played a vital role in filling by appointment another SVCRD subdistrict director position, which she did not have the legal ability to do. Further, the SVCRD, through the conducting of business by an illegitimate board of directors, continued to function and enter into agreements creating liability for the constituents of the district, even after the VCPA filed suit. The ruling by the District Court in this matter has the impact of allowing the wrong doer to continue to damage the office and the constituents the office serves.

Further, such a ruling is in contravention of the Idaho Constitution, specifically Section 4, which sets out the right of suffrage. By allowing someone to hold office when illegally appointed, without the

authority of law, and in contradiction to the rules and laws set out to guarantee a right of suffrage, the Court sanctions such activity as long as the person is out of office by the time the case is heard. In contrast, by judging the case on the "conditions that exist at the time the action is brought", as this Court has done for more than 100 years, creates a policy that protects the public and discourages those who hold office illegally from continuing their course of conduct contrary to what the public desires.

B. The District Court erred in applying the de facto officer doctrine to usurpation actions.

In granting the Defendants' motion for summary judgment, the District Court failed to consider the merits of the claim regarding the illegal appointment of Yvette Davis after the expiration of her term. As discussed above, the District Court avoided the merits of the usurpation claim against Defendant Yvette Davis by declaring the action moot due to her overwhelming election loss subsequent to the filed usurpation claim, but prior to the hearing on the motions for summary judgment. The District Court committed error when, without a basis in fact or the record, applied the de facto officer doctrine to Pat Cowles and Donald "Mike" Keithly.

1. The District Court committed error when declaring the SVCRD Board was a valid entity at the time Mr. Keithly was appointed.

The District Court glosses over, without analysis or recitation of fact, the validity of the Board at the time Mr. Cowles and Mr. Keithly were appointed. "At the time of the appointment of both Mr Cowles and Mr Keithly the Board was a valid governmental entity thus Mr. Smith and Ms. Davis held their positions with authority of law and the appointment carries full authority of law." R., pp. 169 & 170.

Assuming, arguendo, Mr. Cowles' appointment was legal, there are substantial issues with Mr. Keithly's appointment. First, Mr. Keithly's appointment happened after Mr. Smith resigned effective February 28, 2011. April 20, 2011 Arment Affidavit, Exhibit 3, p. 35. Second, the appointment happened after Mr. Smith and Mr. Cowles appointed Yvette Davis to her position in direct

contradiction to Idaho law as previously argued. *Id.*, Exhibit 3, p. 22. Both of the above happened after various members of the public and the VCPA had brought the issue of the validity of the Board of Directors to the SVCRD Board's attention.

By glossing over the issue of Yvette Davis's appointment after the expiration of her term, the District Court granted validity to a Board that did not have validity and the presumption of being a valid board. Even if Mr. Cowles appointment was legitimate, Mrs. Davis's appointment clearly was not. With only one valid director there cannot be a quorum and a valid appointment cannot be made. As a result Mr. Keithly's appointment was an invalid appointment.

2. The District Court incorrectly applied the de facto officer standard set out in *Whelan* case when deciding Mr. Keithly had not usurped office.

The District Court cited the case *State v, Whelan,* 103 Idaho 651 (1982) as justification for determining Idaho has recognized the de facto officer standard. "Idaho has long recognized the de facto office doctrine which sets forth the legal defect in a person's holding of a particular office does not invalidate the person's official acts State v Whelan 103 Idaho 651[.]" Memorandum Decision, R., p. 170.

The *Whelan* case involved two police officers and a challenge as to whether they had met the technical requirements to exercise the authority of a police officer. (See *Whelan*) This Court determined the officers were not required to take an oath and went on to describe what is the de facto doctrine and standard:

> An officer de facto is one who actually assumes and exercises the duties of a public office under color of a known and authorized appointment or election, but who has failed to comply with all the requirements of the law prescribed as a precedent to the performance of the duties of the office. *People v. Cradlebaugh*, 24 Cal.App. 489, 141 P. 943 (1914); e.g., *Rogers v. Frohmiller*, 59 Ariz. 513, 130 P.2d 271 (1942); *Sheldon v. Green*, 182 Okl. 208, 77 P.2d 114 (1938); *National Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wash.2d 345, 130 P.2d 901 (1942). A de facto officer performs his duties under color of right of an actual officer qualified in law so to act, both being distinguished from the mere usurper who has neither lawful title nor color of

> right. *See State v. Britton*, 27 Wash.2d 336, 178 P.2d 341, 346 (1947). *Whelan* at 655.

In this case, Yvette Davis and the rest of the SVCRD were put on notice there were issues with Yvette Davis's claim to office. April 1, 2011 Affidavit of Matthew C. Williams, Exhibit A, pp. 1 & 2. The VCPA filed a usurpation action against Yvette Davis after she was illegally appointed to a director position that was vacant because the term had expired. Yvette Davis had not been elected, as she was part of the SVCRD Board that had missed the election filing dates for the second time for the district director position she held and no election had yet been held. Further, Yvette Davis was clearly appointed in outside of the authority granted the SVCRD Board by Idaho law. As such, her appointment was not authorized by law and she does not qualify for de facto officer status.

Such a status should be reserved for situations as presented in *Whelan*, where two officers were legally hired and performing work as hired, but may have missed the technical aspect of being sworn in. Had Yvette Davis been lawfully elected but not sworn in, the de facto officer doctrine would apply. Such is not the case. She is in fact a usurper which the doctrine, as explained by this Court, does not apply. If she is usurping office she cannot validly operate as a de facto officer and Mr. Keithly's appointment was invalid.

The District Court incorrectly opines that Mr. Keithly's appointment did not result from anything he did. *See* Memorandum Decision, R., p. 169.. The District Court is incorrect on two grounds. First, it was well publicized the VCPA had filed an action against the Yvette Davis and Pat Cowles alleging they were usurping their offices and had deprived the constituents of the SVCRD the opportunity to select the board of directors and Mr. Keithly was aware of this action. See Affidavit of Kenneth Arment. Second, Mr. Keithly had direct knowledge suits had been filed against the individuals comprising the Board of Directors, including the prior holder of the director position he was seeking, yet chose to continue seeking appointment to the office.

3. The District Court committed error when declaring the SVCRD Board was a valid entity at the time Mr. Cowles was appointed.

The application of the de facto officer doctrine with respect to Pat Cowles is a more difficult case than the application to Mr. Keithly's director seat. Pat Cowles was appointed by Mike Smith and Yvette Davis. Neither Mike Smith nor Yvette Davis had faced election at the time they appointed Pat Cowles to fill the vacated director seat.

The SVCRD published notice of an election for board of directors, but did not publish how many seats or which seats were up for election. Behnke Affidavit, Exhibit C, p. 9. The publication declared there would be an election for the "office", in the singular. *Id.*. There were actually two director offices up for election. Mike Smith was one of two people who filed for the position, the other being Jim Roberts. Id., π 10, p. 5. Mike Smith did not declare which director position he was filing for. Jim Roberts also declared for the position and also failed to declare what director position he was filing for. Id., Exhibit C, pp. 5 & 6. Thus, there were two applicants for one advertised position for the 2008 election and by law there should have been an election. *See* I.C. § 31-4306 These issues were compounded by the fact the SVCRD Board missed the publication deadlines for the 2008 election as well as failed to publish which offices were up for election. Because the SVCRD did not follow the election process set out in Idaho Code, the election was cancelled illegally and Mike Smith did not hold office after a valid appointment or election.

Similarly, Yvette Davis did not validly hold office during the time Pat Cowles was appointed, as argued above. She held office from January 2008 to January 2011 without the color of law.

The two directors remaining in office, Mike Smith and Yvette Davis, did not validly hold office, they could not validly appoint Pat Cowles to complete the term vacated by Jim Roberts. As such, Pat Cowles held office without a valid appointment and the de facto doctrine should not apply as set out above.

C. The District Court erred when applying election law to a usurpation case.

Rather than viewing this case as a usurpation case, the District Court incorrectly viewed the case as an election challenge. Thus, the District Court applied an incorrect standard requiring the VCPA prove that the result of the election would have been different but for the procedural error. *See* Memorandum Decision, R., p. 168. The District Court completely missed the point-- It is the actual absence of an election that brings this case about. Had there been an election, the District Court would have been correct in applying the standards of an election challenge.

The District Court went on to opine the record was uncontroverted regarding the level of notice the public had regarding the SVCRD Board director positions that were up for election.

> Voters are certainly entitled to proper notice of an election and substantial compliance with the law is to be followed to give the public an opportunity to know when and where the election is to be held. Clearly where notice is sufficient to appraise voters of the purpose of the election a notice of election will not be invalidated. *See Lind v Rockland School District* 120 Idaho 928, 1991. The record before the Court is uncontradicted that voters were given notice of the election and the purpose of the election. *Id.*

The record is actually uncontradicted that the voters were not given substantive and procedural notice of the election and purpose of the election. The election notices failed to properly identify the offices that were up for election and in one case identified an office that does not exist. The publishing dates were missed, and in two separate instances the elections were missed completely and separate off calendar elections had to be scheduled. The only properly noticed replacement election garnered more than one person declaring for the position and the incumbent Yvette Davis, who was the beneficiary of several of the errors, was soundly defeated. There is no better evidence that the outcome might have been different than the actual outcome when the SVCRD Board finally published a correct election notice to the public.

The District Court went on to opine that procedural errors were not enough, as these procedural errors must have "a clearly traceable causal connection to the deprivation of an elector or an estranged

candidate's procedural due process rights or otherwise materially impacted the election process. For these reasons the impact of these procedural errors is de minimus and at best speculative." *Lujan v Defenders of Wildlife* 504 US 555. *Id.*, R., p. 169.

The State agrees with the Defendant on at least one point of law asserted early in the proceedings: *Tiegs v. Patterson*, 79 Idaho 365 (1957) controls this action. In *Tiegs*, just as in the present case, the defendant made the same argument that election contest laws were the exclusive remedy and barred the usurpation action (in that case brought merely by the individual challenging the irrigation district board's actions). This Court followed its prior decision on the same issue issued in *Toncray v. Budge*, 14 Idaho 621 (1908) over 51 years earlier in concluding again that two statutes stand side by side for the protection of the people with the usurper action reserved for the Prosecuting Attorney and the Attorney General except for the one exception for the individual who asserts that he is the rightful office holder. *Tiegs* at 365. The *Tiegs* Court quoted several additional supporting authorities but none with as much length as the decision in *People ex rel. Budd v. Holden*, 28 Cal. 123:

> 'It is first claimed by the appellant that the District Court had no jurisdiction in the premises, and that the only remedy in cases like the present is under the statute which prescribes the mode and manner of contesting elections. * * * No proposition could be more untenable. It is true that the Act providing the mode of contesting elections confers upon any elector of the proper county the right to contest, at his option, the election of any person who has been declared duly elected to a public office, to be exercised in and for such county. But this grant of power to the elector can in no way impair the right of the people, in their sovereign capacity, to inquire into the authority by which any person assumes to exercise the functions of a public office or franchise, and to remove him therefrom if it be made to appear that he is a usurper having no legal title thereto. The two remedies are distinct, the one belonging to the elector in his individual capacity as a power granted, and the other to the people in the right of their sovereignty. Title to office comes from the will of the people as expressed through the ballot-box, and they have a prerogative right to enforce their will when it has been so expressed by excluding usurpers and putting in power such as have been chosen by themselves. To that end they have authorized an action to be brought in the name of the Attorney-General, either upon his own suggestion or upon the complaint of a private party against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State. It matters not upon what number of individual persons a right analogous in its results when exercised may have been bestowed, for the power in question none the less remains in the people in their sovereign capacity. * * *'
> *Tiegs* at 370 & 371.

Below, counsel for the Defendant asserted the characterization that usurper actions are disfavored by reference to monarch and his unchecked directions made over 400 years ago in another county. In

the United States of America in general, and in Idaho particularly, an action on behalf of the people to remove usurpers is favored as it supports good government and their constitutional rights to vote. Idaho Constitution Article VI §§ 1; 2; & 4. On at least one occasion, this Court has pondered in a note why the usurpation remedy was not used. *Clark v. Ada County Bd. Of Com'rs*, 98 Idaho 749, n.1 753, 572 P.22d 501 (1977).

Throughout these proceedings, however, the Defendants have argued that the State has only shown procedural error with regard to notice and statutory deficiencies. These procedural errors have then compounded by void or voidable secret decisions made contrary to public policy and law. This position of ignoring the fundamental substantive nature of notice, however, is made in defiance of the golden standard of American Jurisprudence, Idaho's standard, of due process as set forth by the U.S. Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and utilized by the Idaho Court of Appeals in *State v. Doe*, 147 Idaho 542, 211 P.3rd 787 (2009) as follows:

> In *Mullane*, the court further held that " the notice must be of such nature as reasonably to convey the required information ..., and it must afford a reasonable time for those interested to make their appearance." Mullane, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873. In other words, meaningful notice consists of both substantive and temporal components. That is, the content of the notice must be such as to fairly advise the person of its subject matter and the issues to be addressed. Notice must be clear, definite, explicit and unambiguous. A notice is not clear unless its meaning can be apprehended without explanation or argument. *Farrell v. Brown*, 111 Idaho 1027, 1032, 729 P.2d 1090, 1095 (1986). In addition, notice must be provided at a time which allows the person to reasonably be prepared to address the issue.

It is clearly a substantive defect if an official moves outside the boundaries of his district, but it is only procedural error if notice of an election filing fails to identify what office for what district is up for election, a defect that certainly causes more harm, disenfranchises more voters and interferes with the right of suffrage more than the official later moving? In short, improper notice is more than a procedural violation, and in the instance where the notice identifies an office that does not exist, it cannot be objectively viewed as "de minimus and speculative at best." Integrity of the democratic

systems and institutions require that unlawful actions may and must be addressedwhere, like here, there had never been an election before and four election cycles of "irregularities" had proceeded without accountability to election and open meeting law requirements by the responsible Board Members.

CONCLUSION

These cases are not about election contests. They are more about the lack of any election contests and the lack of accountability from the individual directors of a public institution. Statutory substantive and procedural notice requirements were waived without accountability to the judicial system and public. They were never even acknowledged publically. Instead, statutory set elections and terms of office were changed without accountability and without public record. This public agency was run like a private club in terms of decision making. People might get upset if they were informed elections were missed or botched for four cycles in a row. And when constituents asked the Directors to look into the "irregularities" they summarily said "NO, go to the Secretary of State if you think anything was done wrong" and they did. Then they were directed to the Valley County Prosecuting Attorney armed with the citation for the usurpation statute, I.C. § 6-602.

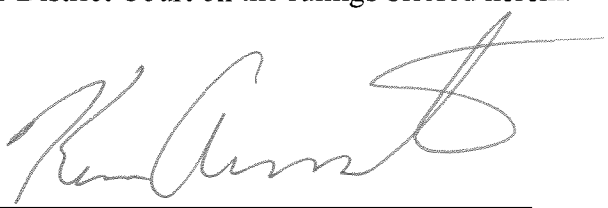
There is a "shall" in the usurpation statute, a shall that imposes upon the Prosecuting Attorney a duty to bring a usurpation action on behalf of the people to protect the integrity of public institutions when the individual officials in those public offices are there unlawfully and fight tooth and nail to keep their workings and accountability secret. These individuals could have, most of us would say should have, taken the opportunity to address the very public and legal concerns at issue in a responsible and working fashion, but instead these individuals chose to dig in and fight to keep what they had secret and to be accountable only to themselves, even reversing their very public and specific decision not to clean it up themselves. Unfortunately, they made this reversal of policy; the apparent policy to fight the Valley County Prosecuting Attorney; and the policy to have the district pay for

attorney fees for the individuals, all in secret also, accountable they thought, only to themselves. They didn't even have to pay for the fight.

These are not *di minimus* procedural errors where the law is substantially complied with and people feel good about the integrity of their public institution over four election cycles. Ms. Davis, who served from the inception of the district, was trounced in the May 2011 election. After the remaining majority incumbent board members still did not heed the call for openness and accountability; they (Cowles and Keithly) were trounced in special recall elections (also their first elections) at the next opportunity in November, 2011. The people had the opportunity and motivation to speak in such a loud voice because there was so much wrong and still they were not being heard. This likely would not be the case if the law did not impose the duty on Prosecuting Attorneys to protect the integrity of public office for local political subdivisions, who in the wrong hands, can out resource, outspend and mount a great "war" effort for personal reasons if there is no accountability.

There is great value in the Court continuing to recognize and uphold the values of accountability provided by Idaho Code § 6-602. The people of Valley County respectfully ask the Court to uphold these values yet again and reverse the District Court on the rulings briefed herein.

DATED this 3rd day of April, 2012



Kenneth R. Arment
Valley County Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I caused a true and correct copy of the forgoing document to be served on the persons identified below on the date and in the manner set forth below.

Paul J. Fitzer
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Two Copies Via U.S.P.S. Priority Mail, Postage Prepaid

DATED this 3rd day of April, 2012.

Kenneth R. Arment